FILE COPY

NOV 2 1933

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

No. 64.

AMY ARZT and JOSEPHINE RAMSEY
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

GRANDIN TRACY VOUGHT,
14 Wall Street,
New York City.

J. GARFIELD HOUSTON,
Oliver Building,
Pittsburgh, Pa.

Counsel for Bankers Trust Company, Trustee.

CARLOS L. ISRAELS,
On the Brief.

THE BALLOU PRESS NEW YORK

INDEX.

PAGE

Preliminary Statement 1

POINT I. The District Court had jurisdiction to order the sale 4

CONCLUSION 6

Table of Cases Cited.

Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371 5

Pusey-Jones Co. v. Hanssen, 261 U. S. 491 5

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933.

AMY ARZT and JOSEPHINE RAMSEY,
Petitioners,

vs.

RUDOLPH B. FLERSHEM, CHARLES O. CORNELL, JOHN H. WATERS, *et al.*, etc.

No. 64.

BRIEF FOR RESPONDENT BANKERS TRUST COMPANY, AS TRUSTEE.

Preliminary Statement.

Respondent Bankers Trust Company is trustee of an issue of debentures of National Radiator Corporation, $10,673,000 principal amount of which are outstanding, all issued under an indenture dated August 1, 1927 (R. 108). More than $10,188,500 of the debentures are deposited with the Respondent Reorganization Committee (R. 293). The Petitioners in this case claim to hold $121,000 principal amount of such debentures. As such trustee this Respondent intervened in the creditors' suit pending in the District Court, prayed for and obtained judgment for the principal amount of the outstanding debentures with interest, and prayed for the sale of the assets of the defendant company.

Petitioners attack, first, the jurisdiction of the District Court to appoint receivers upon the bill of complaint of the Reorganization Committee, though the defendant company consented to such appointment, and, second, the action of

the District Court in having entered the decree of sale and in approving the Plan of Reorganization.

This brief will be devoted primarily to the question of the jurisdiction of the District Court to order a sale pursuant to the prayer of the bill of intervention of Bankers Trust Company as trustee. The brief for the Petitioners in this case raises incidental points with respect to the Plan of Reorganization, the form of the decree of sale, and the adequacy of the price. These we have deemed it better to discuss in the companion cases, Nos. 62 and 63, upon the petition of First National Bank of Cincinnati and International Heater Company.

It is perhaps desirable here, however, to take brief issue with some of the statements contained in the Petitioners' brief with respect to the part played by Bankers Trust Company in the reorganization.

1. It is stated in Petitioners' brief (p. 5) that the Reorganization Committee "with the approval of Bankers Trust Company, the trustee of the debentures, decided as part of the plan to reorganize not to pay the installment of interest which would become due February 1, 1931". The implication is that the Trustee gave such approval and thus committed a breach of trust. Bankers Trust Company was not only trustee for all the debentures. It held as a banking institution some $1,040,000 principal amount. Naturally, therefore, it was consulted about the plan (R. 417).

With the decision not to pay interest the Trustee had no part. That was a matter of business judgment for the Board of Directors of the Company, upon which the Trustee was not represented. It gave no approval of the default.

2. At pages 11 and 12 of the brief, it is argued that the intervention of Bankers Trust Company as Trustee to obtain a judgment for the amount of the outstanding interest coupons and later for the principal of the debentures was "to enable the National Radiator Corporation to plead that

judgment as a bar to suits for interest by non-assenting debentureholders". The implication again is that such action was in derogation of Petitioners' rights. The indenture under which the debentures were issued specifically provides that the Trustee shall, upon the happening of an event of default, be entitled to sue and to take judgment. Further than this, the Trustee is required, when instructed by the holders of one-fourth in principal amount of outstanding debentures, to institute such suit (R. 28). Such instructions were given (R. 111), and the Trustee acted, as a logical step in the enforcement of a past due debt. The indenture further provides that any moneys collected by the Trustee after the payment of costs and expenses shall be applied to the payment of "principal and interest, without preference or priority of principal over interest or of interest over principal * * * *ratably*" (R. 27). (Italics ours.) We submit that not only was it entirely proper for the Trustee upon the instructions so received to institute the suit, but that it was in duty bound to do so. If, incidentally, preferences among debenture holders were avoided, we see nothing reprehensible in the fact.

3. At pages 15 to 17 of Petitioners' brief, the participation of this Respondent in the affairs of the Company is again attacked. We submit that its position as Trustee for a large majority of the creditors of defendant company, apart from its interest as a creditor on its own behalf, entitled it to be consulted as it was.

POINT I.

The District Court had jurisdiction to order the sale.

The question of the jurisdiction of the District Court to appoint receivers and the propriety of its so doing upon the bill of complaint of the Reorganiation Committee will, we take it, be fully discussed in the brief of that Committee. This discussion will be restricted, therefore, to the jurisdiction of the Court under the intervening bill of this Respondent as Trustee. On October 5, 1931, the bill of complaint of the Reorganiation Committee was filed (R. 6). On October 9, 1931, the defendant filed its answer and consented to the appointment of receivers (R. 63). On October 13, 1931, the Respondent Trustee obtained an order permitting it to institute suit to recover interest on the debentures outstanding (R. 71). Thereafter at the direction of holders of more than 25% in principal amount of the Debentures outstanding the Respondent, in conformity with the provisions of the indenture (R. 25), declared due the principal of the Debenture and, again with leave of court, (R. 80) obtained judgment for such principal. On January 9, 1932, Bankers Trust Company as Trustee obtained on order allowing it to intervene as party plaintiff and to file its intervening bill praying for enforcement of its judgment for the principal amount of the outstanding debentures (R. 93). It is submitted that, regardless of what the jurisdictional situation may have been on October 9, 1931, it was the duty of this Trustee, when instructed by a large majority of its debenture holders to sue for the interest and principal of their debt. Receivers having already been appointed for the debtor and its properties being already in the control of the District Court, the only proper manner by which the Trustee might proceed to enforce its judgment against the defendant was through intervention in the receivership cause. The receivership being then con-

tinued at the request of Bankers Trust Company, as such judgment creditor, any possible question as to the jurisdiction of the District Court was thereafter removed.

Regardless of the then pending receivership, the District Court had jurisdiction to entertain the Trustee's suit upon the independent ground of diversity of citizenship and the amount in controversy. The Trustee's judgment alone would have constituted independent ground for the appointment of receivers under principles settled by this Court in the very cases which Petitioners cite. Thus, in *Pusey-Jones Co.* v. *Hanssen,* 261 U. S. 491, which is the cornerstone of Petitioners' argument, Mr. Justice Brandeis, after pointing out that while a simple contract creditor has, in the absence of statute, no substantive right to the appointment of a receiver, said:

> "after execution upon a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditor's bill", citing *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, and further "He (the judgment creditor) may, by such a bill, remove any obstacle to satisfying his execution at law; or may reach assets equitable in their nature; *or he may provisionally protect his debtor's property from misappropriation or waste by means either of an injunction or a receiver*". (Italics ours.)

The property being, regardless of the validity of the appointment of the original receivers, in the custody of the District Court, the issuance of execution and its return unsatisfied would have been an empty gesture. The Respondent Trustee therefore filed at once what was in effect its creditors' bill, and in its intervening petition applied for a marshalling and sale of the assets as the final relief and *the appointment of receivers as an incident thereto* (R. 85-92). Similar action in the ancillary proceedings immediately followed (R. 116), and receivers were appointed under what was in effect a judgment creditors' bill, and were thus in possession of the entire assets of the defendant company. That receivership was necessary to preserve those assets pend-

ing the final relief prayed for is, we think, self-evident on this Record. The properties consisted of industrial plants, machinery and chattels appurtenant thereto. They were operated as a going business. To permit individual creditors, whether or not debenture holders, to levy executions upon such property and to disrupt it pending a final determination of the respective rights of all would clearly have been wasteful and destructive of the rights of the vast majority of creditors.

CONCLUSION.

We think that we have conclusively demonstrated here that, regardless of any fancied invalidity in the action of the District Court in appointing receivers upon the bill of complaint of the Reorganization Committee, it clearly had the power to appoint them upon the intervening petition of the Respondent Trustee, and that it exercised that power in the only way practicable for the protection of the obvious best interest of the creditors of the defendant company as a whole.

The decrees should be affirmed in all respects.

Respectfully submitted,

GRANDIN TRACY VOUGHT,
14 Wall Street,
New York City.

J. GARFIELD HOUSTON,
Oliver Building,
Pittsburgh, Pa.

Counsel for Bankers Trust Company, Trustee.

CARLOS L. ISRAELS,
On the Brief.